

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL SHANE SIMMONS,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3032 EDA 2012

Appeal from the Judgment of Sentence Entered September 19, 2012
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0006311-2011

BEFORE: PANELLA, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.

FILED MAY 23, 2013

Michael Shane Simmons (Appellant) appeals from the judgment of sentence of five to 10 years' incarceration followed by five years' probation imposed after a jury trial where Appellant was convicted of rape, indecent assault, and sexual assault.¹ Counsel for Appellant has filed a Petition to Withdraw as Counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), *Commonwealth v. McClendon*, 434 A.2d 1185 (Pa. 1981), and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009). We grant counsel's petition to withdraw, and affirm the judgment of sentence.

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. §§ 3121(a)(3), 3126(a)(4), and 3124.1 respectively.

The events leading up to the arrest and conviction of Appellant occurred in the evening and early morning hours of September 26 and 27, 2011. Appellant and Victim had been friends for several months; with Appellant often coming to her home to be with Victim and her two children. At one point during this friendship, the two began to engage in sexual intercourse, but Victim stopped it when Appellant refused to use a condom.

On September 26, 2011, Victim wanted to work late and Appellant offered to pick up her oldest son from school and wait at home with him until Victim arrived. Victim and her younger son arrived at home at 9:30 p.m. Victim put her younger son to bed, made something for dinner, then went to her room to watch a movie. Appellant was also there watching the movie. At about eleven o'clock that night, Appellant realized he had missed the last bus and Victim told Appellant he could sleep on an air mattress.

Subsequently, Appellant went to the bathroom and when Victim went to find the remote control, she noticed a pair of her underwear on the couch. She confronted Appellant about this and Appellant asked her if he could have the underwear. Victim said "no" and became uncomfortable, but Appellant apologized and Victim still allowed him to sleep over.

Victim then fell asleep on the floor, and in the course of her sleep, she felt herself being lifted up and carried into bed. Victim then woke up suddenly and felt a "sharp pain right below [her] belly button to [her] private part" and she was on the wrong side of the bed. N.T., 6/4/2012, at 82. She also realized the dress she was wearing was "all the way up and

[she] had no draws (*sic*) on.” **Id.** She saw her underwear was on the floor and felt a “drip coming from [her].” **Id.** at 83-4. She ran into the bathroom, sat on the toilet, opened her legs and stuck her hand in her vagina. She then testified that a “real nasty disgusting odor came out of [her].” **Id.** at 84. Victim further testified that one of the reasons she could not date Appellant was “because he has an odor” and does not shower. **Id.** at 84-5.

Victim then took a shower and woke up Appellant. Appellant admitted to Victim that he had licked her to get her “in the mood” and that he then had sexual intercourse with her. Appellant apologized; and, Victim ran outside to a neighbor’s house and called the police around 5:30 that morning. Police came and questioned Appellant, who eventually wrote a statement for the police. Appellant told police that Victim was his girlfriend and they had “relations” that night and he was unsure if Victim was awake while they were having “relations.” Affidavit of Probable Cause, 9/27/2011. Appellant was arrested and charged with the aforementioned crimes.

A jury trial was held on June 4 and 5, 2012, and Appellant was convicted of all charges. On September 19, 2012, Appellant was sentenced as detailed above. On October 19, 2012, Appellant filed a timely notice of appeal. The trial court ordered Appellant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b); and, on November 7, 2012, counsel for Appellant filed a timely statement of intention to file an **Anders** brief pursuant to Pa.R.A.P. 1925(c)(4).

As a preliminary matter, we address counsel's application to withdraw before reaching the merits of the issues raised in the brief. **Commonwealth v. Rojas**, 874 A.2d 638, 639 (Pa. Super. 2005) (quoting **Commonwealth v. Smith**, 700 A.2d 1301, 1303 (Pa. Super. 1997)) ("When faced with a purported **Anders** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw.").

To withdraw pursuant to **Anders**, counsel must: 1) petition the Court for leave to withdraw, certifying that after a thorough review of the record, counsel has concluded the issues to be raised are wholly frivolous; 2) file a brief referring to anything in the record that might arguably support the appeal;² and 3) furnish a copy of the brief to the appellant and advise him of his right to obtain new counsel or file a *pro se* brief to raise any additional

² Our Supreme Court has addressed the requirements of an **Anders** brief in **Commonwealth v. Santiago**, 987 A.2d 349 (Pa. 2009). Counsel seeking to withdraw must

(1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Id. at 361.

points that the appellant deems worthy of review. **Commonwealth v. Garang**, 9 A.3d 237, 240 (Pa. Super. 2010). Thereafter, this Court independently reviews the record and issues. **Id.**

Counsel petitioned this Court to withdraw, certifying that he has made a thorough review of the case and determined that there are no non-frivolous issues to raise on appeal. Counsel has filed a brief that includes a summary of the history and facts of the case, one point of arguable merit, and counsel's analysis of why he has concluded that the appeal is frivolous. Counsel has certified that he served Appellant with a copy of the **Anders** brief and attached a copy of his letter to Appellant advising him that he may obtain new counsel or raise additional issues *pro se*. As such, counsel has complied with the requirements of **Anders** and **Santiago**. We therefore proceed to an independent review of the record and the issue that counsel stated arguably supports an appeal.

In his brief, Appellant asserts that the following point of arguable merit: "[w]hether the [t]rial [c]ourt erred in failing to caution [the jury] to disregard certain insulting remarks made by [Victim] towards [Appellant] during her testimony?" **Anders'** Brief at 5.

Specifically, Appellant argues that Victim's remarks about Appellant having an odor and not showering were inflammatory and prejudicial. Appellant's counsel objected to this portion of Victim's testimony, but the trial court overruled the objection. N.T., 6/4/2012, at 85. On appeal,

Appellant asserts the trial court should have sustained the objection and/or should have offered an instruction to the jury "cautioning [it] to ignore the insults hurled by [Victim] at [Appellant] during her testimony." **Anders'** Brief at 9.

Before we consider this issue, we point out that "[f]ailure to request a cautionary instruction upon the introduction of evidence constitutes a waiver of a claim of trial court error in failing to issue a cautionary instruction." **Commonwealth v. Bryant**, 855 A.2d 726, 739 (Pa. 2004). Thus, because we can find no place in the record where Appellant requested the trial court to offer a cautionary instruction, this portion of the issue is not preserved for our review, and Appellant is not entitled to relief.

We now consider whether the trial court erred in overruling the objection to this testimony. "The admissibility of evidence is within the sound discretion of the trial court, which may only be reversed upon a showing that the court abused its discretion." **Commonwealth v. Bryant**, 57 A.3d 191, 194 (Pa. Super. 2012) (internal quotations omitted). "Typically, all relevant evidence, *i.e.*, evidence which tends to make the existence or non-existence of a material fact more or less probable, is admissible, subject to the prejudice/probative value weighing which attends all decisions upon admissibility." **Commonwealth v. Dillon**, 925 A.2d 131, 137 (Pa. 2007).

Evidence may also be excluded if the probative value is outweighed by the danger of unfair prejudice. Pa.R.E. 403.

"Evidence is not unfairly prejudicial simply because it is harmful to the defendant's case." **Commonwealth v. Page**, 965 A.2d 1212, 1220 (Pa. Super. 2009) (quoting **Commonwealth v. Dillon**, 592 Pa. 351, 367, 925 A.2d 131, 141 (2007)). The trial court is not required to "sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand." **Id.** Exclusion of evidence on the grounds that it is prejudicial is "limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." **Commonwealth v. Foley**, 38 A.3d 882, 891 (Pa. Super. 2012).

Commonwealth v. Flamer, 53 A.3d 82, 88 (Pa. Super. 2012)

Instantly, Victim's testimony about Appellant's odor was more probative than prejudicial. She testified that she was not in a sexual relationship with Appellant; and, one reason she was not in a sexual relationship with him was because she thought he smelled bad. Furthermore, one of the ways Victim knew that Appellant had sexual intercourse with her was because of the odor coming from her vaginal area. These factors, coupled with the fact there is no reason to believe that the jury would be more likely to convict Appellant merely because he smelled or did not shower regularly, are enough to show that the trial court did not abuse its discretion in overruling Appellant's objection to Victim's testimony. Accordingly, this issue does not entitle Appellant to relief.

Petition to withdraw as counsel is granted. Judgment of sentence affirmed.

J-S24037-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambitt", written over a horizontal line.

Prothonotary

Date: 5/23/2013